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WAR AND LAW.*

LAW creates rights. It not merely defines them; it creates them. Without law, one may what he can. With law, one can only that which he may. Law is the device by which the many, individually weak, control and compel the few individually strong or cunning. It is a device by which is reduced nature's handicap in favor of the physically strong and ruthless. Where law obtains, those who are fitted to the system created by the law, as the economically efficient, prevail and survive. In the absence of law, only the strong and cunning can survive.

War is the logical expression of physical force. It is the negation of peace between nations, as law is the assertion of peace between individuals. International law, to be sure, theoretically contemplates and provides for war within the law; but the present struggle persuades that this is hardly more than sterile theory.

A gathering of lawyers, intent upon the science of their calling at a time when nearly all the so-called civilized world is at war, is, therefore, an anomaly, unless the prevalence of war prompts them again to search for and test the foundations of their science.

Only because international law is primitive and in it, therefore, we may discover perhaps more easily than in the more complex and finished product of municipal law some of the fundamental concepts of jurisprudence, and not at all because I have any peculiar learning in that branch of our science, I wish to call to your attention some modern views as to what are the fundamental concepts of international law. For this purpose, I shall contrast an American view, as expressed in the Declaration of Rights and Duties of Nations, adopted by the American Institute of International Law; a French view, as expressed by Antoine Pillet, a member of the faculty of law

* An address delivered before the Minnesota State Bar Association on August 9, 1917.

in the University of Paris, and a German view, as expressed by Dr. Joseph Kohler, Privy Councillor and Professor in the University of Berlin. After these I shall be so bold as to suggest a theory, in part, at least, my own.

The American Institute of International Law consists of five delegates chosen by the Societies of International Law of each of the twenty-one republics in the Western Hemisphere. It is not official, but exists with the approval of each of the governments. At the first meeting of the Institute, held in Washington, beginning on December 29, 1915, there was adopted the Declaration of Rights and Duties of Nations, as follows:

"WHEREAS, The municipal law of civilized nations recognizes and protects the right to life, the right to liberty, the right to the pursuit of happiness, as added by the Declaration of Independence of the United States of America, the right to legal equality, the right to property, and the right to the enjoyment of the aforesaid rights; and

"WHEREAS, These fundamental rights, thus universally recognized, create a duty on the part of the peoples of all nations to observe them; and

"WHEREAS, According to the political philosophy of the Declaration of Independence of the United States, and the universal practice of the American Republics, nations or governments are regarded as created by the people, deriving their just powers from the consent of the governed, and are instituted among men to promote their safety and happiness and to secure to the people the enjoyment of their fundamental rights; and

"WHEREAS, The nation is a moral or juristic person, the creature of law, and subordinated to law as is the natural person in political society; and

"WHEREAS, We deem that these fundamental rights can be stated in terms of international law and applied to the relations of the members of the society of nations, one with another, just as they have been applied in the relations of the citizens or subjects of the states forming the Society of Nations; and

"WHEREAS, These fundamental rights of national jurisprudence, namely, the right to life, the right to liberty, the right to the pursuit of happiness, the right to equality before the law, the right to property, and the right to the observance thereof are, when stated in terms of international law, the right of the nation to exist and to protect and to conserve its existence; the right of independence and the freedom to develop itself without interference or control from other nations; the right of equality in law and before law; the right

to territory within defined boundaries and to exclusive jurisdiction therein; and the right to the observance of these fundamental rights; and

"WHEREAS, The rights and the duties of nations are, by virtue of membership in the society thereof, to be exercised and performed in accordance with the exigencies of their mutual interdependence expressed in the preamble to the Convention for the Pacific Settlement of International Disputes of the First and Second Hague Peace Conferences, recognizing the solidarity which unites the members of the society of civilized nations;

"*Therefore,* The American Institute of International Law, at its first session, held in the City of Washington, in the United States of America, on the sixth day of January, 1916, adopts the following six articles, together with the commentary thereon, to be known as its Declaration of the Rights and Duties of Nations:

"I. Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states.

"II. Every nation has the right to independence in the sense that it has a right to the pursuit of happiness and is free to develop itself without interference or control from other states, provided that in so doing it does not interfere with or violate the rights of other states.

"III. Every nation is in law and before law the equal of every other nation belonging to the society of nations, and all nations have the right to claim and, according to the Declaration of Independence of the United States, 'to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them.'

"IV. Every nation has the right to territory within defined boundaries and to exercise exclusive jurisdiction over its territory, and all persons whether native or foreign found therein.

"V. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe.

"VI. International law is at one and the same time both national and international; national in the sense that it is the law of the land and applicable as such to the decision of all questions involving its principles; international in the sense that it is the law of the society

of nations and applicable as such to all questions between and among the members of the society of nations involving its principles."[1]

In this announcement there is none of the hesitancy of over-refinement; but, if it lacks in scientific nicety, it is youthful, buoyant and hopeful. It has in it the same ring of noble purpose which stirs our hearts when we read the Declaration of Independence. The captious may cavil and challenge the authors to state whence they derive these ideas of national rights. The historical scholar may point out the many fallacies into which writers have fallen by pressing too close the analogy between a nation and an individual, and argue that these declarants have not escaped that pitfall, but despite all scientific criticism, mankind will read this declaration as we, for the past one hundred and forty years, have read the Declaration of Independence, and feel in their hearts a noble aspiration toward world-unity, sympathy and justice. It is the challenge thrown to the world by Democracy—self-respecting and regardful of others' rights, courageous and generous. It is not only a challenge—it is an invitation to the rest of the world to join in a peaceful and well-ordered international life. The democracies of the American continent are horrified by war, but they stand undismayed and unafraid.

In an article published in the June number of the Yale Law Journal, entitled "Some Observations on the Private International Law of the Future," translated by Dr. Ernest G. Lorenzen, Professor of Law in the University of Minnesota, Antoine Pillet, a distinguished professor in the University of Paris, treats of two questions of private international law—the status of aliens and the conflict of laws. The two questions treated are perhaps foreign to our present inquiry, but expressions of the learned author, as he develops his subject, make vivid to our understanding, in contrast with the American point of view, the despairing attitude of the French scholar. He says:

"I regard it as certain that the end of the war will bring about a noticeable rapprochement between certain nations which have remained, heretofore, very distant toward each other. Is it necessary for me to indicate here that I do not mean to allude to any plan whatsoever for the reconstruction of society on a rational basis? The persons who do me the honor of reading these lines well know that I regard all projects of this sort as so many idle fancies which cannot be realized. The contemporaneous events since and inclusive of The Hague Conferences, have only confirmed these views. * * *

[1] X Am. Jour. of Int. Law, 124.

Since the middle of the nineteenth century, the period in which the first of the new doctrines of Private International Law came to light, their development has been in the direction of an almost unlimited cosmopolitanism. It was assumed that the mission of this science was not only to aid in the good administration of private justice among the nations, but that it should lower also, by degrees, the barriers separating subjects from aliens, so as to make of all inhabitants of the civilized countries one people, with a view to subjecting them gradually to the same institutions. Hence, the tendency to favor changes of nationality; hence the avowed determination to suppress all differences in the civil status of aliens and subjects; hence, also, the growing frequency of those great conventions which aim to establish, to an appreciable extent, uniformity of legislation.

"We believed that progress was to be found in that direction. We all shared, more or less, this mistake, and I am well aware that there are pages in my writings to which I would no longer subscribe. One painful experience has undeceived us. We committed the two-fold mistake of thinking that the juridical consequences attached to the idea of nationality could be weakened without danger and of failing to see that the same regime of law does not equally suit all nations. We now know that a people grows stronger by birth and not by naturalization. Equality between subjects and aliens is with us no longer a dogma. The great conventions have not justified the high hopes reposed in them. The spirit of cosmopolitanism is therefore dead. Warned by experience, the people will be resolutely nationalists. They will live by themselves knowing that by seeking too much foreign collaboration they incur the risk of ending in servitude."

Later, in discussing the embarrassments of the tribunal called on to decide a question of a conflict of laws, he says:

"And this (difficulty) will remain so as long as the international society, which has been promised to us so often, has not been organized; and it will never be organized."[2]

These are the expressions of a man who has witnessed the war not from afar, but whose ears have been deafened by the thunder of the enemy's guns at the gates of his own beloved city. To the Frenchman, however scholarly he may be, however valiantly he may struggle to preserve his scientific objectivity, a theory of international society that contemplates close co-operation between France and Germany is abhorrent. His scholarship may avail to resist the

[2] XXVI Yale Law Jour. 631, 633, 638.

temptation to revile the enemy, but his soul cries out—"the spirit of cosmopolitanism is dead".

In 1909, only five years before the war broke out, Dr. Joseph Kohler, Professor in the University of Berlin and a Privy Councillor, published the great work which has been translated as Volume 12 of the Modern Legal Philosophy Series, under the title of, "The Philosophy of Law". Speaking of the distinguished author, Dr. Roscoe Pound has referred to him as "the first of living jurists," adding:

"No one else has come so near to taking all legal knowledge for his province. No one, therefore, is so well prepared to reduce all legal knowledge to a system."[3]

The last book of this work treats of international law with a vision so clear and a scholarship so profound that one reading it would surely think its author would, in all events, preserve his scientific attitude, observe phenomena dispassionately and bring to bear upon the observed phenomena the cold, clear light of reason. Contrast, then, with what was to be expected, an article written by this same author and published in September, 1915, in the "Zeitzschrift Für Völkerrecht". A translation by J. S. Reeves, a professor in the College of Literature, Science, and the Arts of the University of Michigan, under the title, "The New Law of Nations," appeared in the June number of this year of the MICHIGAN LAW REVIEW. After commenting upon the efforts made during the preceding century, especially by the Hague Peace Conferences, to enrich international law by treaties and to organize to some degree the international community, Dr. Kohler says:

"This phantasmagoria of a family of nations which would dictate the norms of International Law and by judicial methods decide international disputes, so that only exceptionally and here and there the structure of the international community would be convulsed by war—all that is far behind us. Twelve months only have passed, but they divide us from all that has gone before as if years had intervened. The occurrences of the past year have accomplished more than decades. The Hague Peace Conferences were dreams of peace which have burst like bubbles and the Peace Palace at the Hague can appropriately open its halls for other praiseworthy aims of mankind.

"We also were enthralled by these illusions, and we are frank enough to confess, if we are rebuked for being unpractical and short-

[3] The Scope and Purpose of Sociological Jurisprudence, 155, quoted in editorial preface to the Philosophy of Law—XV—XVI.

sighted for doing so, that it was our honorable German nature which permitted us to overlook cunning and weakness; it was our belief in mankind which led us and the thought that at least a spark of our German idealism was to be found among other peoples. We fully believed that we had to do with civilized peoples, who, like us, were constantly striving to solve the greatest problems of humanity. We assumed that every nation had its own task in the furtherance of culture. We believed that the world was big enough so that all nations in furthering their own interests would by straight-forward intercourse increase the spiritual assets of the entire world. This illusion was a huge deception of race psychology, but it was the deception of a man of honor who falls into the grip of a cunning band; such an error honors him who errs, and loyalty to a mistaken morality raises him who is thus deceived giant-high above the reptile which crawls about him.

"Then we became clear-visioned. The German *Siegfried,* who has never learned to know fear, is awakened at the right moment. Just as *Siegfried* once understood the speech of birds, so now we recognize in the buzzing and tumult of the world-strife the true soul of our opponents, and the dragon of cunning, lies, and slander is stretched beneath our victorious sword. The noble myth of our people has become a reality.

"An International Law based on international treaties can no longer be. International association can only lead to norms of law if the peoples are actuated by legal endeavors. Treaties with liars and falsifiers cannot form sources of law; only those peoples can co-operate in the development of law who have a living conscience. Shall we recognize as brother nations having kindred conceptions of justice those like the French—a nation of bragging tricksters, who drench us with most miserable abuse and outrageous slander—or a perfidious company of peddlers, like the English, who from the first day of the war have flooded the world with statements which they knew to be calumnies and lies—a nation whose government did not hesitate, like bandits following the fashion of *Caesar Borgia,* to undertake sneaking bribery in order to get rid of a *Roger Casement?* Or a nation of barbarians, like the Russians, whose excesses in East Prussia have suddenly brought before our eyes the whole Muscovite brutality? Or the Italians, among whom a miserable lottery-playing group made up of the immature and half-educated proletariat, and of phrase-drunken demagogues, could bring the government to violate sacred treaties, and to fall upon the flank of their sworn allies? No, and thrice, No! These ties are forever broken. And as for neutrals, the United States, glorying in an empty play of moral plat-

itudes with the blessing of the *Vanderbilt-Morgan* millions, has done enough injury to us with its munitions policy. Neutral states like Spain, Switzerland, and Sweden will always appear to us dear and worthy. On the other hand, a portion of the press of Holland, Norway, and Denmark has wounded us sorely by its unjust treatment of us. And Holland has persuaded herself, by putting her trade under English control to further England's war of starvation! In all these circumstances these peoples can never be bound with us into an Areopagus wherein every state works with even justice in order to lay down for the world the statutes of the Law of Nations."[4]

With this learned and scientific introduction, this German scholar proceeds, if I understand his thought, ambushed as it is in clouded sentences, to develop the thesis that international law is to be derived by a process of induction applied in the light of the law of evolution to observed international phenomena. And he boldly maintains that only the trained, scientific minds of Germans can suffice; that only in Germany can be found those of adequate scientific attainments to make true observations or draw correct conclusions. From this it would seem to follow that the rest of the world is bound to await the announcements of German scholars for the rules of international law. His modest reason for this astounding position is the superior scientific attainments of the Germans, but the practical result is, of course, that Germany is to make and declare the rules which shall govern all inter-state relations. There remains only one step and that this exalted scholar fears not to take. If German scholars are to announce rules of international law without the help of other European or American jurists and without the consent of other nations, obviously there will be required means to enforce the rules so declared. But this consideration has no terrors for this German sage, for, as he fears not to say, "This is German science, for German science alone has been able to work in systematic fashion," so he fears not also to say, "The claim is often made that there is no International Law because it is trampled under foot by our enemies. This is as erroneous as it would be to assert that there is no municipal law because at the present time one might be liable to be robbed by the banditti of the Italian Abruzzi, or assaulted by the Parisian *apaches,* or by the Milanese rabble. Naturally, International Law needs its sanction just as every branch of law does, but we shall, as I hope, be so vastly fortified by our victorious war that we can undertake the protection of International

[4] XV Mich. Law Rev. 631, 635-6.

Law just as centuries ago the Lombard Dante invoked the German Emperor as the protector of law and the shield of justice."[5]

These are not the ravings of a defeated military chieftain, they are not the outpourings of an over-emotionalized actor nor the hysterical outcry of a grief-stricken mother, but the solemn, scientific, precise statements of a learned German scholar in a scientific journal of world-wide reputation. Consider how profound must be the influence of war which can jolt a philosopher into the utterance of such grotesqueries. Nearly three hundred years earlier, Hugo Grotius, the father of international law, maintained that "certain laws, of which fidelity to plighted word is the most important, are therefore as immutable as human nature,"[6] but this modern German professor of international law boasts of the honorable nature and idealism of a nation which calls a solemn treaty a scrap of paper. No wonder he says that international law based on international treaties can no longer be and that treaties with liars and falsifiers cannot form sources of law. If he remembers that the German chancellor expressed surprise that England should enter the war, although five days before England did so the directors of the North German-Lloyd Steamship company wired the master of one of their vessels that Germany was already at war with England, no wonder he calls the English perfidious![7] And who but a German student of international law could be shocked by Muscovite brutality while shutting his ears to the cries of murdered women and children in Belgium and turning his prophetic eyes from the four hundred thousand refugees who have since died by a roadside in Poland, their wasted flesh a food for crows, their stripped bones gathered for fertilizer by their thrifty, ghoulish conquerors?[8] No wonder the moral platitudes of America plague his conscience. To what apologist for murder has any expression of morality ever sounded as ought but platitude? If such an abdication of the throne of reason does not persuade us that Cardinal Newman was right in his contention that the pursuit of civilization is not enough, it would seem to make ap-

[5] Ib. p. 638.

[6] Studies of Political Thought from Gerson to Grotius, by John N. Figgis, p. 88.—"On this subject we are supplied with noble arguments from the divine oracles, which inform us, that God himself, who can be limited by no established rules of law, would act contrary to his own nature, if he did not perform his promises. From whence it follows that the obligations to perform promises spring from the nature of that unchangeable justice, which is an attribute of God, and common to all who bear his image, in the use of reason." "The Rights of War and Peace," translated from the original Latin of Grotius by A. C. Campbell, University Classics Library, p. 134.

[7] The Kronprinzessin Cecilie, 244 U. S. 12.

[8] Report of Frederic C. Walcott of the Rockefeller Foundation, Nat. Geographic Mag., June, 1917.

plicable to the philosophers and literati of twentieth century Germany the words written in 1796 by Burke of the political philosophers of the French Revolution:

"Never before this time, was a set of literary men converted into a gang of robbers and assassins. Never before did a den of bravos and banditti assume the garb and tone of an academy of philosophers."[9]

Would that he could have truly prophesied that this hideous masquerade should never again offend our eyes!

These three different views of the fundamentals of international law, different as they are, all assume or assert the sovereignty of the state. But a system of law cannot be built upon the theory that those affected by the law are completely sovereign, for to the extent that the law does compel them, they cease to be absolutely sovereign. The only possible path to a richer field of international law leads through the broken wall of complete sovereignty.

During the middle ages, the theory prevailed that the world was one, as controlled either by the Roman Empire or by the Christian Church, and international relations were hardly apprehended. With the growth of the great powers, however, came the necessity for some rules to regulate their relations, and international law gradually grew up under the dominion of strong, national feeling, a feeling which was in part the cause, and in part the effect, of the national development.

A moment's reflection will explain the strength of this group feeling. The bees and the ants have their community life, which they preserve by co-operation. So far as we know, the power that fits the individual bee or ant into his community life is instinct. Perhaps the greatest in the series of steps of evolution was the birth of self-consciousness which made the individual realize himself as an individual and led him to ratiocinate on his relations to his community. Man differs from the ant perhaps more in this than in shape or size. Among primitive men, the struggle for existence, the competition for food and other necessities of life, arrayed each group in antagonism to every other. Only that group could survive which was coherent, and cohesion could only exist as each member was devoted to the other members of his own group and loyal to the whole. Within the primitive group there was in some measure discipline, law, order and peace, and without there was war. By this very arrangement of primitive society, war and peace interacted on each other, the existence of war outside the group making neces-

[9] A Letter to a Noble Lord.

sary peace within and peace within fitting it to protect itself against war from without.[10] When two hostile clans or tribes of primitive men fought for the possession of a good hunting-ground, there was only the question of which of two groups of equally worthy or worthless men should have more food, though all of the men engaged doubtless felt themselves to be patriots and entitled to the plaudits of their fellows. Patriotism, as a conscious emotion, originated, therefore, in the instinct of self-preservation or of group-preservation. It was a biological necessity and therefore a moral virtue. And this primitive biological necessity or virtue has had incalculable potency in the development of our modern states and the formation of the rules which have been accepted as regulating the relations between them. It has availed in the past, under many pretexts of right, sometimes to instigate to aggression, in order that the group might be strengthened in territory or power, and again it has armed the hand for defense to protect that which the group already had. Whenever contests of force arise between groups, be they small clans or tribes or great nations, this instinctive patriotism revives and motivates the great mass of men who respond quickly to primitive emotions.

Nationalities, however, dearly as we cherish them, are, after all, but instrumentalities of human progress. The instinctive patriotism which commands not only unwavering but enthusiastic devotion of each man to his own country, has its biological and historical justification in the creation of these great instrumentalities. But do not a wider vision and a profounder insight into the destinies of man on earth and a deeper sympathy with the purposes of social order lead to the conclusion that without the destruction of national existence, there shall grow up between civilized nations a far stronger bond than has heretofore existed? Has not primitive patriotism evolved among educated men from an unreasoning instinct as an aid in preserving the group to an intellectual and moral devotion to ideals of government—national and international? Most of the Americans living today have never had occasion to feel the patriotism which arouses them to defend their country and far less have they felt the patriotism that drives to aggression. Within the memory of most of the present generation, there has been only the opera bouffe war with Spain in 1898, which only for a moment gave a tingle to our national nerves. And yet we are not wanting in patriotism, a patriotism, I believe, of a higher kind. Even the immigrant, newly come to our shores, feels a devotion, which he would

[10] Cf. Folkways, by W. G. Sumner, §§ 13-20.

himself be at a loss to explain, to the institutions of freedom whose shelter he has sought. We read our Declaration of Independence with its outworn eighteenth century philosophy and thrill and thrill again with love of our country, conceived in such noble resolve, and we repeat the pregnant phrases of our bills of right and glory that we are citizens of a country dedicated to liberty. Our emotional response, too, finds its confirmation in our sober moments of reason. We may be persuaded that the eighteenth century doctrine of natural rights, which inspired our forefathers and has guided much of our constitutional development, has no foundation in reason, but so also are we persuaded that pragmatically tested, the doctrine of individual liberty, however suspicious may have been its source, has worked, and we believe that while man remains at once a lazy animal, requiring incentive to labor, and also a liberty-loving spirit scorning servitude, it will continue to work. It was an expansion of this higher and nobler spirit of patriotism into the international field which, I surmise, induced the five United States members of the American Institute of International Law to give their adherence to the six propositions which I first read. This patriotism is something more than historical or biological. It has a moral or spiritual content. It does not assert that Americans are better than other people. It does not assert that American institutions must be imposed upon other people. It does not assert that America must declare the norms of international law and enforce observance thereof. No, our patriotism is neither vainglorious nor selfish. The priceless boon of liberty which our hearts desire and our intellects approve we want not only for ourselves—we should rejoice to see it the heritage of every man in every land. Ours is a devotion to an ideal!

By this I do not mean that we Americans are superior to other people in having a higher form of patriotism. If we were attacked in such a way that our people were persuaded that their lands would be devastated, their homes destroyed, their wives and children murdered and that a conqueror would, at the close of war, dominate our country so that as a native walked the street, he would have to salute a foreign officer at each corner, we should feel the same savage patriotism which today fills the breast of every Belgian and Frenchman. I am talking now rather of this sentiment of patriotism in the American mind in times of peace. But if our patriotism be indeed a loyalty to a political ideal, if it be not only free from envy but instinct with charity, it should prompt in us the hope that the country we so love shall lead in the march toward international ideals.

It is not necessary now to discuss differences between scholars as to the bases of international law; suffice it to note that recognized rules have grown up as customary law, supplemented by specific agreements and treaties; and, as has been suggested, to the extent that the customs have prevailed between equals, they are evidence of agreements, so, it may be said, all international law is founded in agreement. Most questions between nations are discussed as questions arising between individuals and governed by rules analogous to those of municipal law. Because there has been no superstate to enforce law, or against which offenses could be committed, all the analogies have been those of civil law and there has been no such thing as international criminal law. A state can have a claim against another state or a national of one state can have a claim against another state and these claims may sound in contract or it tort, but no state can be indicted or convicted for a felony or misdemeanor.

The suggestion I wish to leave with you today is that this is in process of change and the entrance of the United States into the present great war on the side of Great Britain and her allies may be the unconscious beginning of an international criminal law.[11] Bear in mind that systems of jurisprudence grow up out of custom, beginning in a single act done, ordinarily, in entire unconsciousness by the actor that he is determining future law. In discussing questions of international law, we are, perforce, driven to analogy, but we must use analogies always conscious of their danger. The Declaration of the American Institute of International Law has been criticized by careful students as failing to observe this caution and pressing too close the analogy between states and private persons.[12] Probably many fallacies have their origin in this analogy. Perhaps a closer analogy is to be found in the relations of corporations, but a still closer one is to be found in societies in which there are local groups of more or less coherence, joined together in a loose organization; and perhaps the best known example of such an organization is to be found in the history of early England.

Up to the time of Edward I. at least, the organization under the king was loose. There were hundreds, towns, lords of the manor—different groups, in a large measure independent of each other and owing varying degrees of allegiance to the king. For instance, the conclusion of the ordinary indictment "against the peace and dignity of our lord, the king," was originally no idle form, but a juris-

[11] Opening Address of Elihu Root, Pres't Am. Soc. Int. Law, Dec. 28, 1915; 10 Am. Jour Int. Law, 1, 7-9.

[12] The Analogy between Natural Persons and International Persons in the Law of Nations, by Edwin DeWitt Dickinson, XXVI Yale L. Jour. 564.

dictional averment which must be proved. The king's peace did not extend to all parts of the realm nor equally to all people, nor did it prevail at all times. One man might be within the king's peace and an assault upon him was "against the peace and dignity of our lord, the king," while a similar assault upon another man at the same time and place might not be a violation of the king's peace. So our common expression, "the king's highway," originated in the days in England when there were four highways within the king's peace, so that an assault committed upon a traveler on one of them was against the peace of the king, while an assault committed one hundred yards away was not.[13]

I am not unmindful that there is a distinction between federal law and international law and to the extent that law becomes federal it may be said to cease to be international.[14] And yet analogies between federal and international law, or between the rules governing groups in a loose organization and those in international law, are illuminating. In this early society in England, violence was common; homicides and robbery were everyday occurrences. The central authority was hopelessly inadequate for the security of the individual and the stranger had little or no protection from the members of the community in which he was attacked. The man who traveled, therefore, from one part of England to another, took his life in his hands. To remedy this, the central authorities sought to impose financial liability upon the hundred or the county which suffered an offense without apprehending and punishing the felon, and the rule grew up, known as the "hue and cry." Under this rule, which probably existed at first by virtue of custom and was afterwards incorporated in statute, if one were assaulted, he could seek out a constable, whose duty it was then to raise a hue and cry, and it was the duty of all within hearing to join with the constable in the pursuit of the felon. Not only this, if the victim could not locate a constable, he could himself raise a hue and cry and it was equally the duty of those within hearing to respond to his call and join with him in the pursuit of the felon, and if one did not respond to the call and do his duty in helping to apprehend the culprit he was himself punishable, nor was he liable for manslaughter or murder for killing a resisting offender.[15]

[13] The King's Peace, Oxford Lectures and Other Discourses, by Sir Frederick Pollock (Macmillan, 1890) p. 65.

[14] Elements of Jurisprudence, T. E. Holland, p. 333.

[15] 2 Hale's Pleas of the Crown (1st Am. Ed.), Chap. XII; Reeves Hist. of Eng. Law (Finlason's Ed.), p. 121; 2 Pollock & Maitland Hist. of Eng. Law, 578, 606; 4 Blackstone's Com. *p. 293; Stubbs, Select Charters (2nd Ed.), 426 et seq., 469; 1 Stephen's Hist. of Crim. L. 188.

Here is an important step in the early evolution of criminal law. It was recognized that an assault was an offense not only against the man assaulted, but against the state, and though the state was itself not sufficiently powerful to control the criminals or to apprehend them after an offense had been committed, it was made the duty of the constituent parts of the state, the citizens, at their own risk and cost, to discharge what we now regard as a function of the state, and to pursue and apprehend and, if necessary, kill the offender.

All law, save as it may include formal regulations of convenience, such as the law of the road, has a moral element. Arising from custom and agreement, it embodies that which is generally accepted to be right. Nations, in the sense that they are governed by international law, are juristic persons, and one may not be a juristic person and free from moral responsibility. International law, like municipal law, embodies and expresses that which is generally accepted to be right. The international community is just as much interested in preserving law and order as is a domestic community, and a violation of international order, of such a flagrant character as to constitute not only a wrong against another international person, but also an offense against the very stability of the international order, if it technically cannot be called an international crime, should arouse, in right-thinking people, the same sense of horror and indignation as are stirred by acts which constitute crime under municipal law, and to the extent that international society is equipped to cope with it, it should be treated as crime. I am not aware that history affords any instance of all other nations or any considerable part of other nations co-operating in punishing one nation as a criminal, but it will be recalled that when the commander of the American man-of-war removed from the Trent, a British vessel, Messrs. Mason and Slidell, the Confederate commissioners who were on their way to England, there was an immediate protest not only from England, but also from Prussia, Austria and France, and these protests were not without the suggestion that unless the United States abandoned the right of search so asserted, war might ensue.[16] Here, then, was the declaration by three great powers that an act which did not affect them directly might be so dangerous as a precedent that they were justified in protesting and even threatening. As each individual of a nation is vitally interested in the preservation of law within his own country, so every nation is vitally interested in the preservation of those rules of international law which make for international

[16] Opening Address of Elihu Root, President of Am. Soc. of Int. Law, April 27, 1916, X Am. Jour. of Int. Law, 217-219.

safety, and just as in primitive England, because the central power was weak, the individuals were bound in law to join together in an effort to apprehend a felon, so, I submit, civilized nations are bound in law,—as it will be if it is not so now—to join together to arrest an international criminal. And the fact that the particular offender is not only a criminal, but an insane criminal, does not alter the rule.

The people of this country saw this present great war begin and were under no delusion as to its causes. They knew that Austria made a demand upon Serbia to which no self-respecting nation could yield. They knew that the demand made by Austria was backed by Germany. They knew that Germany declined the reasonable request of England for a few days' delay. They knew that Germany, in violation of a treaty to which this country was itself a signatory,[17] invaded the territory of poor Belgium, not a party to the quarrel, and presumably safe within the shelter promised by Germany herself.[18] As the war proceeded, we witnessed the occupation of Belgium's territory, the murder of her women and children, the enslavement of her men, the wholesale destruction by starvation of peaceful peasants in Poland, the bloody massacres of unoffending Armenians and the sinking upon the high seas of neutral merchantmen with their innocent passengers and crews, in violation of common decency and of every accepted rule; and still we were not moved to action. With few exceptions and with extraordinary moral obtuseness, our people witnessed these world outrages with indifference. Because we were not attacked on our own soil, our primitive patriotism was not aroused. When the Lusitania was sunk, and a thousand or more non-combatants, including helpless women and little children, went to their watery graves, indignation was stirred and more people began to feel that this country was or should be interested, but still the passion of the country was not inflamed. Not until there was disclosed Germany's plot to combine with Mexico and Japan and attack us upon our own territory, not until Germany at the same time announced her intention to resume her ruthless submarine policy, did the President feel that the sentiment of the country was sufficiently awakened to justify him in recommending to Congress that it recognize a state of war. In his appeal of April second, however, magnificent address though it is, he stresses particularly the wrongs to our own country and the threat to demo-

[17] Convention V, Second Hague Conference; but see Ed. note, IX American Journal of International Law, 959.

[18] Treaty of January 23, 1839, between England, Austria, Russia and Prussia. See Some Questions of International Law in the European War, by James W. Garner; IX American Journal of International Law, 72.

cratic institutions. If ever a country had been patient, almost to the point of cowardice, in endurance of wrongs and repeated wrongs, of outrage upon outrage, ours is that country. These offenses against us were not only adequate, they were compelling, causes of war—but I could wish that the consciences of our people had been sufficiently sensitive so that they would have reacted to the higher motive of national duty.

From nothing I have said would I have it inferred that I have in mind any criticism of our President or his administration. If I have felt that the outrages perpetrated by Germany and the philosophy we know is back of them, have proved her an international, insane criminal, I have also realized that he upon whose shoulders has rested the grave responsibility of guiding our people, could act in this great crisis only as he was assured that the conscience and judgment of the American people were behind him, and with regret and shame I confess to the belief that there has been no overwhelming moral earnestness in our people which has demanded of their Government that it should join the international hue and cry. The tragic offense has been too far away; imaginations are not sufficiently vivid; perhaps, indeed, consciences have not been highly enough sensitized. With advancing civilization and a greater emphasis upon, and consequent familiarity with, questions of international relations, however, I believe that the American people will, in time, come to realize that they and all peoples who desire justice are and must be deeply concerned in the prevention of international crime and the punishment of international criminals.

The League to Enforce Peace is seeking to arouse public opinion so that at the close of this war a treaty shall be made under which all civilized powers shall agree that all disputes shall be submitted, those that are justiciable to a court for decision, and those that are not justiciable, to a Commission of Conciliation, and that the joint military and naval forces of the signatories shall be used against any power which goes to war before submitting such controversy. The plan has the approval of many of our most thoughtful students of international law and of many of our leading men in public life, and has received the endorsement of President Wilson. If adopted, it would, in effect, incorporate in treaty the suggestion I now make, to the extent, at least, of declaring that an act of war, before submitting the cause of war to arbitrament, would bring upon the offender's head the wrath of all other signatory powers. Such a treaty would be declaratory of what I suggest should be recognized as international law and of what, I believe, our own country, by its entrance into the war, has already subconsciously recognized as in-

ternational law. America has gone into this war not only because her citizens have been killed on the high seas, not only because her ships have been sunk, not only because Germany has maintained a spy-system within our borders and has plotted for an attack by our southern neighbor, but also, in the words of our President, because "the world must be made safe for democracy," and by that phrase, I take it, he means that there is a moral purpose in our people which feels itself in danger of defeat so long as a powerful nation is permitted to commit national murder with impunity. And he intends to say, further, that the American people are in this war not only for the defense of their own rights, but in the defense of fundamental and eternal righteousness for all peoples and for all time. Russia, in backing up Serbia, may have been actuated to some extent by purely nationalistic ambitions; France, in joining Russia, may have been moved in some degree by the requirements of treaties; England, in entering the war, may have been guided, in part, by the belief that prudence required that Germany be kept from occupying the coast of France and Belgium, but millions of the right-thinking citizens of these countries felt, too, that they were bound to endure war not only for their own national interests, but that it might be established for all time and for all men that Austria could not, at will, crush her smaller neighbor, nor Germany, at will, trample the Belgian people into the dust. With our country, now one of the Allies, national ambitions are pushed to the background, and the war must proceed for the great moral purpose of making it impossible for this particular offender, at least, ever again to flout the ordinary decencies. Organized piracy was once driven from the seas by the co-operation of civilized powers. Brigandage on land should fare no better.

But there are those who cry aloud, "Tell us what terms of peace you will make? Tell us what you hope to accomplish?" The man who stops a huntsman as he raises his gun to shoot at a flying duck to inquire how he intends to cook the duck when he has shot it, is a fool. The man who stops the patrol wagon to ask the policemen what punishment they are going to inflict upon the rioters whom they are galloping to arrest is worse than a fool—he is an accessory after the fact. The constabulary of the civilized world is now engaged in catching an insane criminal and it will be time enough to ask what shall be done with him after he has been disarmed and manacled. Terms of settlement of a civil action may be discussed, but neither a righteous man nor a righteous nation can compound a felony.

As we are gathered here discussing these questions so profoundly interesting to us, all over our broad land strains of martial music are quickening the pulse beats of our country's youth. Young men who almost until today looked forward to normal lives of quiet professional or business pursuits are already in khaki and scanning the first pages of their manual of arms. In another month hundreds of thousands of our best boys will be in training camps, and before many more months will be on the soil of France, or, perchance, of Russia. And then, my friends, will come the day of trial. We who stay behind, only, I hope, because we are unfitted by reason of age or other infirmity for military service, will scan the daily casualty list and our hearts will sicken as we learn of loved ones who have gone to unmarked graves. But as the glamour of war and the exhilaration of military bands do not now rob of clear vision those whose convictions are founded in sound and sober thought, so the day of grief will not avail either to enlarge or to lessen the righteous indignation of him who loves right because it is right, nor to stay the flaming sword in the sure, strong hand of Justice. And when the war is over, be our losses what they may, be our grief more even then we fear, rest assured that if there has been born into the world the living principle that a nation stands not only in relations to each of the other nations, but in relations to the whole, and that out of that relationship there arises a moral and legal duty to refrain from crime, and that that duty is one which all are bound to enforce—be assured, then, I say, that this awful war of untold horror will not have been fought in vain.

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